No. 30.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OCTOBER TERM, 1891.

THE UNITED STATES OF AMERICA,
Appellee,
v.
THE STEAM TUG "PILOT," her Steam Engines, Boilers, Machinery, Tackle, Furniture, etc.,
and
JOAN OLIVE DUNSMUIR,
Appellant.

ARGUMENT FOR APPELLANT

IN OPPOSITION TO

Appellee's Motion to Vacate Decree and Dismiss Appeal.

BURKE, SHEPARD & WOODS,
Attorneys for Appellant.

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Appellee's Motion to Vacate Decree and Dismiss Appeal.

The United States of America, the appellee in this case, has filed a motion to vacate the decree of the Circuit Court of Appeals herein, "for the reason that this court has no jurisdiction in this case."

The case arose upon a libel in admiralty filed by the United States against the Steam Tug "Pilot," a British tug, for an alleged violation of Rev. Stats. § 4370, which

prohibits, under penalty of a fine, the towing, by steam tug boats not of the United States, of documented vessels of the United States plying from one port or place in the same to another, but which provides that "this section sholl not apply to any case where the towing, in whole or in part, is within or upon foreign waters." The libel simply charged that the Pilot on May 3, 1891, towed an American bark, the Valley Forge, on her way from San Francisco, California, to Port Angeles, Washington, the said bark Valley Forge being then and there a documented vessel of the United States plying from one port or place in the same to another. The claimant's amended answer sets up the details of the towing complained of, showing that the Pilot picked up the Valley Forge in the waters of the Straits of San Juan de Fuca, near Vancouver Island and northward of the center line of the straits, and towed her thence to Port Angeles, whence, under the contract of towage, she was to tow her on to a British port north of the straits, but was prevented from so doing by the seizure to enforce which the libel was filed ; and that said towing was in part within and upon foreign waters. The proofs showed the facts to be as averred in the answer. The District Court rendered a decree for the libellant for the statutory fine and costs, to reverse which the claimant prosecuted her appeal to this court. The court below held, in its opinion (48 Fed. Rep. 319) upon which its decree was founded, that "By treaty stipulations the boundary between the two countries is upon a line following the middle of the strait, and all that part of it north of the middle is British water, and all south of the line is American water ;" but that because "by treaty the entire strait is free and open to both countries for the purposes of naviga-

tion, so that the vessels of each are free to sail anywhere in the strait upon either side of the line," therefore "It is my opinion that while this treaty remains, no part of the strait can be regarded as *foreign waters* to either American or British vessels. . . . And further, that the term 'foreign waters' as used in section 4370 means water under the exclusive dominion of a foreign government for all purposes. My conclusion is that foreign tugs are not privileged to tow American vessels bound from one American port to another, on either side of the strait; and that a penalty has been incurred by the tug Pilot as charged in the libel in this case."

The decision of this court was rendered on April 19, 1892, reversing the decree of the court below and remanding the cause with instructions to dismiss the libel, and to enter a decree for claimant. This decision is embodied in the opinion of his honor Judge Gilbert (50 Fed. Rep. 437), which thus states the case: "The question is presented whether the waters of the straits of San Juan de Fuca, lying north of the dividing line between United States and British Columbia, are 'foreign waters,' within the meaning of the statute." The opinion holds that "Notwithstanding the license of free navigation over the whole of the straits, which is reserved to each of the contracting parties" by the treaty between the United States and Great Britain of June 15, 1846, "a definite line of division is adopted which determines the limit of jurisdiction of each nation. All waters north of the line are British waters, subject to the control and dominion of Great Britain. All waters south of the line are American waters, and are under the jurisdiction of the United States."

The motion now made by the libellant and appellee, to vacate the decree of this court for the reason that it has no jurisdiction herein, is based, it is understood, upon the contention, now raised for the first time on the part of the United States, that in this case the construction of a treaty made under the authority of the United States is drawn in question, within the meaning of subd. 5 § 5 Ch. 517, Vol. 26 U. S. Stats. at Large, the "Circuit Court of Appeals Act" of March 3, 1891, and that therefore an appeal from the decree of the District Court lay directly to the Supreme Court of the United States under that section, and no appeal lay to this court under the provisions of § 6 of that act.

The question involved in the decision of this motion is, then, Did this case, as presented in the district court, "draw in question the construction" of the treaty of 1846? The appellant insists that it did not, that the case presented merely drew in question the construction of the words "foreign waters" in Rev. Stats. § 4370, and that hence her appeal was properly prosecuted to this court, and could not have been prosecuted to the Supreme Court of the United States.

On neither side do the pleadings in this case invoke any right derived under the treaty, or charge any obligation imposed by that treaty, or mention the treaty at all. The treaty appears for the first time, on the record, in the opinion of the judge below, who there invokes it as an aid to his determination of the meaning of the words "foreign waters" in the act of Congress under which the penalty was claimed.

The first answer to the motion, then, is that even if the

decision in this case does amount to a construction of that provision of the treaty adverted to by the learned judge below, making the navigation of the whole strait free and open to both nations, yet the construction of the treaty is not "drawn in question" upon the record of the case, or necessarily involved in its issues. It has been held repeatedly that to give it a federal court jurisdiction of the cause on the ground that a "federal question" is involved, the federal question must be distinctly and necessarily raised upon the record.

Simmerman v. Nebraska, *116 U. S. 54.*

Germania Ins. Co. v. Wisconsin, *119 Id. 473.*

Spies v. Illinois, *123 Id. 131.*

Brooks v. Missouri, *124 Id. 394.*

Chappell v. Bradshaw, *128 Id. 132.*

Clark v. Pennsylvania, *Ib. 395.*

Quimby v. Boyd, *Ib. 488.*

Texas & Pac. Ry. Co. v. So. Pac. Ry. Co., *137 Id. 48.*

Butler v. Gage, *138 Id. 52.*

But, secondly, is the construction of this treaty, even if not expressly drawn in question on the face of the record, necessarily involved in the determination of the issue raised upon the record?

This cannot be so, unless it becomes indispensable to refer to the treaty in order to determine what are foreign waters on our northwestern frонteir. But it is not thus indispensable. The word "foreign" has a settled and definite meaning altogether apart from the provisions of that treaty, as was pointed out in the opinion of this court. "The word 'foreign' means belonging to another nation

or country ; belonging to or subject to another jurisdiction." Now the United States, acquiring this northwestern territory by discovery and settlement, claimed sovereignty over an indefinite yet not an unlimited extent of the western portion of North America. Its claims were never pushed farther north than the parallel of 54° 40′ ; they were finally compromised and settled, by the treaty of 1846, at the parallel of 49°. But suppose that the treaty of 1846 had never been made, or that, prior to it, the penal statute giving rise to this case had been in force, and that a case had arisen thereunder, involving the towing by a British tug of an American documented vessel picked up in the coast waters of the British Dominions on the parallel of 60°, or at any other locality in the northwestern waters of that part of British America wherein the United States had never disputed Great Britain's sovereignty. Under such circumstances, could it reasonably be claimed that a court could not hold the towing to have been partly in foreign waters, because there had been no treaty fixing the hither limit of the foreign country? The claimant of the tug would certainly have had the benefit of the saving clause of the statute, notwithstanding there were in existence no means of determining at what definite line the towing in foreign waters ceased and the towing in American waters began. It is not necessary, then, to refer to the text of the treaty of 1846 to ascertain what are foreign waters within the meaning of this penal statute. Foreign waters, with or without a treaty, are those "belonging to another nation or country; belonging to or subject to another jurisdiction."

The court below held in this case, however, and the counsel of the United States now insists, that the treaty

stipulation that the navigation of the whole of the straits shall remain free and open to both parties gives the United States a right to prosecute for the penalty imposed on a foreign tug for towing a documented vessel in American waters, where the towing is in part north of the international boundary line fixed by the treaty, the same as though the towing had been wholly on this side of the boundary, that is, wholly in what are *strictly* American waters. But to make this claim, even had it been seasonably and formally made in the record below, is not to claim a right under the treaty, which right is denied by the opposite party. It does not amount to a claim by the United States of a *right* derived from the treaty, for it does not go to the extent of a claim of *sovereignty* or *jurisdiction* over the waters of the straits lying north of the boundary line. It is a mere claim that the waters of the north half have from the provisions of the treaty derived a *character*, as "common waters," which excludes them from the benefit of the exemption of "foreign waters" from the scope of the penal statute under consideration, by the saving clause of that statute. This claim, indeed, though not set out in the record, is made by the United States, and denied by the appellant. But the question thus raised is not, What is the construction of the treaty; does it make the waters of the north half of the straits "foreign" within the meaning of the saving clause of the penal statute (enacted twenty years later)? But it is rather, What is the construction of the saving clause of the penal statute; does its phrase "foreign waters" embrace such as, under the treaty, are free to the navigation of American vessels, though lying outside the international boundary line?

Again, the claim that the waters of the north half of the straits are "foreign" within the saving clause of the statute is not a claim of a right derived under the treaty, set up by the appellant and denied by the United States. For, as has been said, the waters north of our boundary and within another sovereignty are *foreign* apart from and in the absence of any treaty ascertaining the location of that boundary. The appellant claims the benefit of the exemption of foreign waters in the *statute*; she claims nothing that rests on the *treaty*; she makes no mention of it.

The statute is penal, and the burden lies on the libellant to bring the case both within its terms and without its exceptions. If the libellant seeks, by a reference to the treaty, to exclude the waters within which the towing was in part done from the scope of the saving clause in the statute, that is not a claim of a right derived under the treaty, but, as we have seen, a mere claim that waters over which no right of sovereignty or jurisdiction is asserted nevertheless derive from the treaty a certain *character* in the contemplation of our domestic penal laws; no more is it a denial of a right claimed by the appellant under the treaty, because the exemption from the penalty is claimed irrespective of the treaty. Viewed either as assertion or denial, the libellant's contention on the merits amounts merely to urging a construction of the *statute* that will exclude from the scope of its saving clause waters that, otherwise foreign, are by the treaty made free and open to the navigation of both parties.

The attempt to give this case the aspect of involving the construction of a treaty goes farther than any of several in which the Supreme Court has disclaimed jurisdiction sought to be thrust upon it on that ground.

Owings v. Norwood's Lessee, 5 *Cr.* 344.

Crowell v. Randell, 10 *Pet.* 368.

McDonough v. Millaudon, 3 *How.* 693.

Maney v. Porter, 4 *Id.* 55.

Gill v. Oliver's Exrs., 11 *Id.* 529.

Carson v. Dunham, 121 *U. S.* 421, 428–9.

Metcalf v. Watertown, 128 *Id.* 586.

As well, indeed, might the United States claim the appellate jurisdiction herein for the Supreme Court rather than this court, by contending that the case involves the construction of the Constitution of the United States, upon the ground, for instance, that the exception in the statute gives preference, by a regulation of commerce, to the ports of one state over those of another, by subjecting the towing business of ports that open on waters in part foreign to foreign competition from which it protects other ports entirely. Indeed, almost any case admits of some fanciful theory that a great constitutional right or a solemn treaty obligation hangs upon its decision. But such claims, along with the one now advanced in this case, are at war with the logic and spirit of the decisions by which the Supreme Court has carefully limited the scope of the judiciary act. This court had the jurisdiction of this appeal and the motion to vacate its decree should be denied.

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Attorneys for Appellant.